UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

UPMC and its Subsidiary, UPMC Presbyterian Shadyside, Single Employer, d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital and SEIU Healthcare Pennsylvania, CTW, CLC	Cases 06-CA-102465, 06-CA-102494, 06-CA-102516, 06-CA-102518, 06-CA-102525, 06-CA-102534, 06-CA-102540, 06-CA-102542, 06-CA-102544, 06-CA-102555, 06-CA-102559, 06-CA-102566, 06-CA-104090, 06-CA-104104, 06-CA-106636, 06-CA-107127, 06-CA-107431, 06-CA-107532, 06-CA-108547, 06-CA-111578, 06-CA-115826

CHARGING PARTY'S ANSWERING BRIEF IN OPPOSITION TO EXCEPTIONS FILED BY RESPONDENT UPMC PRESBYTERIAN SHADYSIDE

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CHARGING PARTY'S ANSWERING BRIEF IN OPPOSITION TO RESPONDENT PRESBYTERIAN SHADYSIDE'S EXCEPTIONS

This Answering Brief is submitted by the Charging Party, SEIU Healthcare Pennsylvania ("Union") in opposition to the Exceptions filed by Respondent UPMC Presbyterian Shadyside.

INTRODUCTION

The Union adopts and incorporates by reference the arguments made in the General Counsel's Answering Brief in Opposition to Respondent UPMC Presbyterian Shadyside's Exceptions. In so doing, the Union reiterates its opposition to ***all*** of Respondent's 298 Exceptions. However, the Union has chosen to address only a limited number of these Exceptions herein and does not waive its opposition to any of the other Exceptions. The Board should not ascribe any lesser significance to those Exceptions not specifically addressed herein.

ARGUMENT

I. The ALJ correctly granted the Union's petitions to revoke Respondent's subpoenas and Respondent waived these Exceptions by failing to request the inclusion of the ALJ's rulings in the official record. (Respondent's Exceptions 13, 14, 15, 33, 34, 38, and 39).

A. Waiver pursuant to Section 102.31(b).

Respondent contends that the ALJ erred in granting in part the Union's petitions to revoke Subpoenas B-720529, B-750528, B-720514 through B-720523, B-750525, and B-750526. Subpoenas B-720529 and B-750528 related to Respondent's efforts to seek documents from the Union and an entity known as the Fair Share Pittsburgh Action Fund concerning any Union organizational efforts and communications between them. Subpoenas B-750528, B-720514 through B-720523, B-750525, and B-750526 sought certain electronically stored information (ESI) from the Union. Subpoena B-750528 sought Union documents related to a shooting that occurred at UPMC's Western Psychiatric Institute and Clinic long prior to the

Union organizing campaign. Respondent did not request that its petitions to revoke, or the ALJ's attendant rulings be made part of the official record and therefore, these issues have not been properly preserved for review.

Section 102.31(b) of the Board's Rules and Regulations requires that "the petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the official record except upon the request of the party aggrieved by the ruling." Here, Respondent's failure to do so requires that Exceptions 13, 14, 15, 33, 34, 38, and 39 must be excluded from consideration by the Board.

Assuming *arguendo* that the Board, for some reason, will allow consideration of these Exceptions despite Respondent's failure to properly preserve them for review, the Union responds to the merits of Respondent's Exceptions concerning the petitions to revoke below.

B. Union and Fair Share Pittsburgh Action Fund Documents - Subpoenas B-720529 and B-750528 (Exceptions 33-34).

On January 24, 2014, the ALJ granted the petition to revoke filed by the Fair Share Pittsburgh Action Fund ("Fair Share Pittsburgh"), a non-party, concerning items 2-6 in Respondent's Subpoena B-720529. *See*, January 24, 2014 Order Granting Petition to Revoke Subpoena B-720529. Respondent contends that the ALJ erred because Fair Share Pittsburgh Action Fund engaged in "concerted efforts with the Union to discredit and harass the Hospital" into voluntarily recognizing the Union and that the ALJ's ruling "prejudiced the Hospital's defense to the charges." [Resp. Brf. at 34-35]. Respondent similarly argues that the ALJ erred in revoking parts of Subpoena B-720528 which sought documents from the Union relating to the Union's organizational efforts and communications with Fair Share Pittsburgh. *See*, January 29, 2014 Order Granting in Part, Petition to Revoke Subpoena B-720528.

The ALJ's rulings were correct and Respondent has failed to demonstrate how the documents sought were material to the ULP allegations. The applicable standard requires that a subpoena "*shall"* be revoked if "the evidence whose production is required does not relate to any matter under investigation or *in question in the proceedings*..." NLRB Rules and Regulations § 102.31(b) (emphasis added).

Fair Share Pittsburgh Action Fund, a nonprofit entity incorporated under the laws of Pennsylvania as a political advocacy organization, is not a party to the instant unfair labor practice proceedings. *See*, January 24, 2014 Order Granting Petition to Revoke Subpoena B-720529 at 1. The subpoena sought documents "related to the Union's organizational efforts since November 1, 2011" and documents relating to the "relationship between Fair Share Pittsburgh and the Union." *Id*.

The ALJ granted the petition to revoke for Subpoena B-720529, correctly reasoning that "the evidence sought in requests 2-6 would [not] be relevant to the issues in the complaint or lead to the admission of material evidence." *Id*. at 2. The ALJ similarly granted the Union's petition to revoke the items in Subpoena B-720528 which sought the same type of documents from the Union relating to its organizing campaign and its relationship with Fair Share Pittsburgh. January 29, 2014 Order Granting in Part, Petition to Revoke Subpoena B-720528.

The ALJ reasoned that the issue in the subpoena to the Union was governed by *Tri-County Paving Inc.*, 342 NLRB 1213, 1216-1217 (2004)(motivation and misconduct of union was not a defense to unfair labor practice proceeding against employer). He correctly concluded:

> The issue in the case before me is whether the Respondent committed the unfair labor practices alleged in the complaint. Since there are not unfair labor practice allegations regarding the union in the complaint before me, I do not believe that the information sought by the Respondent regarding the general manner in which the Union conducted its organizational campaign is relevant to the issues to be litigated.

January 29, 2014 Order Granting in Part, Petition to Revoke Subpoena B-720528 at 2.

The ALJ subsequently denied Respondent's motion for reconsideration of his ruling on the petitions to revoke the subpoena to the Union. *See*, February 11, 2014 Order Denying Motion for Reconsideration. Citing *Design Technology Group LLC d/b/a Betty Page Clothing*, 359 NLRB No. 96, slip op. at 1-2 (2013), he reasoned that "regardless of an employee's motivation or any instructions received from the Union, the relevant question is whether the employee engaged in Union or protected concerted activity and whether such conduct was the reason for the employer's discharge or discipline of the employee." February 11, 2014 Order Denying Motion for Reconsideration at 2.

In its Exceptions to these rulings, Respondent utterly failed to show that the documents sought from and about Fair Share Pittsburgh are relevant to the allegations in the complaint. At most, Respondent offers wildly speculative conjecture that "Fair Share Pittsburgh was likely privy to the Union's manufacturing of ULPs, direction of employees to violate hospital policies and other harassing tactics…" [Resp. Brf at 35]. Even if Respondent's attenuated claim were true, the ALJ correctly reasoned in all three orders that such "evidence" was not relevant to the issues in the complaint, i.e., whether ***Respondent*** committed the wrongful acts alleged and its motivation in doing so. Accordingly, the Board should affirm the ALJ's rulings on the petitions to revoke Subpoena B-720529 and B-720528.

C. Subpoena B-720528 -- Union documents relating to Union organizing campaign and purported instructions to employees and evidentiary rulings on Respondent's proposed exhibits (Exception 13, 14 and15).

Respondent challenges the ALJ's order denying revocation of those sections of Subpoena B-720528 seeking information relating to the Union's organizing campaign. [Resp. Brf. at 32-33; January 29, 2014 Order Granting in Part, Petition to Revoke Subpoena B-720528; February

11, 2014 Order Denying Motion for Reconsideration]. Respondent claims such documents and other evidence it sought to admit at the hearing[1] would show that "the Union instructed employees to intentionally violate the Hospital's work rules for the purpose of generating fodder for improper ULP charges against the Hospital," citing its relevance to the "credibility of those witnesses who contend the Hospital systematically targeted them because of their union activities." [Resp. Brf. at 32-33].

The ALJ revoked those portions of the subpoena and rejected Respondent's proffered exhibits on relevance grounds. For example, in rejecting the admission of Respondent's Exhibit 218, an email from Union organizer Sarah Fishbein, the ALJ ruled:

> I guess we're going to have to address this at the beginning of the trial. I thought I made it clear in my rulings on the subpoena that ***the question here is whether or not someone engaged in Union activity and if the employer knew about it and if they were disciplined, whether or not the Respondent was motivated by the Union activity or regular business considerations.*** All right. So instructions from the Union, people's motivation for engaging in Union activity in my view under the case law is not really relevant to the issues that I have to decide.

Tr. 85:7-17 (emphasis added).

Accordingly, the ALJ's orders revoking the subpoena and in ruling on Respondent's evidence were correct for the same reasons noted in the preceding section.[2]

[1] Respondent cites to rejected exhibits PUH/SHY 23 (SEIU Campaign manual), and PUH/SHY 218 (email from Sarah Fishbein). Respondent also cites to apparently rejected PUH/SHY 208 which is not part of the record.

[2] In addition, the ALJ's order was correct for another independent reason: the need for confidentiality concerning a union's organizing and bargaining strategy is well-established under the NLRA. *See Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1997) ("[R]equiring the Union to open its files to Respondent would be inconsistent with and subversive of the very essence of collective bargaining…. If collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure."); *Silgan Plastics Corp.*, 2012 NLRB LEXIS 628, at *38 n.18 (Sept. 20, 2012) (citing *Berbiglia* in rejecting the employer's inquiry into union's strategy manuals and organizing materials "because they gave every indication of being a fishing expedition into arguably privileged internal Union materials").

D. Union Production of Electronically Stored Information (ESI) - Subpoenas B-750528, B-720514 through B-720523, B-720525, and B-720526 (Exception 38).

The Union and Respondent each issued subpoenas seeking Electronically Stored Information (ESI) from the other, and each party filed petitions to revoke challenging, *inter alia*, the production of ESI as being unduly burdensome. The ALJ urged the parties to attempt to resolve their disputes, and they were able to substantially narrow the issues. He subsequently issued a fair and even-handed order, determining that ***neither party*** "need produce electronic documents ("ESI") except to the extent that the party has already collected ESI in connection with this case." *See*, February 11, 2014 Order Further Granting Petitions to Revoke at 2. Notably, the ALJ's decision yielded a greater benefit to Respondent than the Union, since Respondent predicated its objections to ESI production on the fact that it had a vaster quantity of material to produce than that identified by the Union.

In weighing the parties' burdensomeness arguments, the ALJ properly balanced the competing interests of the parties, the relevancy and necessity of the information, and the potential cost and burdensomeness of its production in the form requested, and applied the factors equally to both parties. *Id*. at 1-2 (reviewing Fed. R. Civ. Proc. 26(b)(2), *The Sedona Principles*, and *CNN America*, 352 NLRB 675 (2008) (for non-binding guidance).[3]

In its "good-for-the-goose but-not-for-the-gander" argument, Respondent asserts that the ALJ's order was correct as applied to itself, but incorrect as to the Union because the Union supposedly failed to establish that its production of documents was "in fact unduly burdensome." [Resp. Brf. at 25]. This assertion is simply false. On February 7, 2014, the Union submitted a detailed description of its unsuccessful efforts to avoid disruption of its normal business

[3] *See, Brink's Inc.*, 281 NLRB 468, 469 (1986) (Federal Rules of Civil Procedure provide "useful guidance although they are not binding on the Agency" in determining petitions to revoke subpoenas).

operations and "design and execute a feasible comprehensive in-house search of all its computer, email and communications systems to collect and review any and all ESI responsive to the Respondent's Requests."[4] *See*, February 7, 2014 Charging Party's and Individual Subpoena Recipients' Submission of Proposed Order Resolving ESI Dispute (Supplementing Petitions to Revoke Subpoenas Duces Tecum B-720528 and B-720514 et al) at 2-3.

A subpoena is properly revoked as unduly burdensome or oppressive where production of the evidence sought "would seriously disrupt [a party's] normal business operations." *Voith Indus. Servs., Inc.*, Nos. 09-CA-075496, etc., 2012 NLRB LEXIS 532, at *2 (Aug. 27, 2012) (quoting *NLRB v.Carolina Food Processors, Inc.*, 81 F.3d 507, 513 (4th Cir. 1996). Applying this standard, the ALJ correctly determined that ***each party*** met its showing of undue burden and his decision revoking the ESI production requirements should be upheld. Respondent's disingenuous attempt to obtain the benefit of this ruling while complaining about its application to the Union should be rejected.

E. Subpoena B-720528 -- Union documents related to a shooting that occurred at Respondent's Western Psychiatric Institute (Exception 39).

On January 29, 2014, the ALJ revoked the provisions of Respondent's Subpoena B-720528 (Requests 51-54) which sought production of Union documents concerning an "incident that occurred in another bargaining unit represented by the Union and the manner in which the Union may have utilized information regarding that incident during its organizational campaign

[4] The Union advised the ALJ that "just a minimal test search by the Union of only a limited portion of one system (i.e., 20 email users' accounts), using a sample of only four of the names specified in [Respondent's] 42 Requests, produced approximately 60,000 results or electronic "documents" containing those names. Each of those 60,000 documents would have to be converted to a viewable file, then manually retrieved and reviewed by an attorney –a project that could not timely be accomplished in connection with this ULP hearing even aside from the extraordinary cost. Of course, the amount of ESI returned by comprehensive searches of all Union electronic systems tracking all 42 of the Requests would be orders of magnitude greater than the 60,000 documents produced by the small test run." February 7, 2014 Charging Party's and Individual Subpoena Recipients' Submission of Proposed Order Resolving ESI Dispute (Supplementing Petitions to Revoke Subpoenas Duces Tecum B-720528 and B-720514 et al) at 3 (concluding that ensuing document review "would require months, not days, of processing by personnel devoted entirely to the project").

at Respondent." *See*, January 29, 2014 Order Granting, in Part, Petition to Revoke at 3. The Union documents sought related to an incident occurring at another UPMC facility, Western Psychiatric Institute, and the incident in question concerned a shooting at that facility long prior to the organizing campaign at Respondent's hospital. [Resp. Brf. at 26]. The ALJ reasoned that the documents sought were not "relevant to resolving the issues presented in the complaint." January 29, 2014 Order Granting, in Part, Petition to Revoke at 3.

In its Exceptions, Respondent implausibly argues that somehow the ***Union's*** documents related to this incident would have helped explain the reasonableness of ***Respondent's*** alleged "intensified safety concerns" when it threatened to arrest Union organizers in its cafeteria at a ***different facility***, Presbyterian Hospital . [Resp. Brf. at 26]. The ALJ correctly revoked these requests on relevance grounds.

Moreover, even if the documents sought were somehow relevant, any error was harmless and waived, as Respondent failed to demonstrate prejudice. Nothing in the ALJ's subpoena ruling precluded Respondent from presenting its ***own*** evidence about its alleged safety concerns resulting from the Western Psychiatric incident. Yet Respondent failed to present any such evidence through the testimony of Gerald Moran, its Chief of Security, about the cafeteria incident, thereby demonstrating the disingenuousness of this exception. [See Tr. 2810 – 2901]. Accordingly, the Board should affirm the ALJ's ruling on the revocation of these items in Subpoena B-720528.

II. Respondent agreed that the Union could produce redacted responsive documents to its subpoenas, subject to its objections; Respondent's objections were either waived or properly overruled. (Respondent's Exceptions 35, 36, 37).

Several of Respondent's Exceptions assert that the ALJ erred in "allowing" the Union to redact information from documents it produced pursuant to subpoenas *duces tecum*.

[Respondent's Exceptions 35, 36, and 37; Resp. Brf. at 20-24]. The redactions involved deletions of the names of employees involved in Section 7 activity, union organizing, internal union strategies or non-responsive materials. [Resp. Brf. at 20-24].

Respondent's Exceptions must fail based on waiver. *See,* NLRB Rules and Regulations §102.46(b) (any exception which is not specifically urged shall be deemed to have been waived; any exception which fails to comply with the specificity requirements of §102.46(b)(1) may be disregarded).[5]

First, Respondent's record citations do not support its arguments about the redactions. Respondent inexplicably cites portions of the record that do not support -- or even relate to -- the arguments being asserted.[6] In fact, the record demonstrates that the ALJ actually ordered the Union to provide unredacted copies of several documents to Respondent, or that the parties stipulated to the redactions, contrary to the asserted Exceptions.[7] Because no relevant record citations support Respondent's Exceptions 35, 36 and 37, they must be disregarded.

Second, the record actually shows that Respondent ***agreed*** that the Union could redact the names of individuals from certain documents in order to protect the employees from potential retaliation or coercion. [Tr. 129:3-16]. Respondent's counsel stated:

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[5] Respondent also vaguely asserts that the ALJ permitted the Union to withhold certain nonprivileged documents. Respondent neither describes the documents that were supposedly withheld, nor cites to portions of the record indicating that it had raised such an issue before the ALJ. Thus, this Exception is waived. Resp. Brf. at 20-24

[6] Many portions of the record cited in these Exceptions 35, 36 and 37 or in its brief have nothing to do with subpoenaed documents withheld or redacted by the Union. (*See* D. 20:4-17 (conclusion that Respondent had conducted unlawful surveillance during cafeteria incident; D. 2:18-31 (description of rulings on petitions to revoke General Counsel and Union subpoenas to Respondents regarding single-employer issue); Tr. 908:23-915:18 (bench ruling on Respondents' petitions to revoke subpoenas regarding single-employer issue).

[7] Several citations in Exceptions 35, 36, and 37 actually ***disprove*** Respondent's arguments. See e.g., D. 59, n. 30 (parties agreed to redact names of sender and recipients of email); Tr. 132:1-18 (ordering Union to provide unredacted documents); Tr. 177:19-22 (SEIU agreed to provide document without redactions); Tr. 184:24 – Tr. 185:9 (ordering SEIU to produce unredacted copy if one could be located);Tr. 1159: 8-12 (GC introducing exhibits redacted by Union); Tr. 288:12-Tr. 289:25 (parties stipulate as to Respondent's Exhibit 24 concerning redactions).

> I believe as Your Honor is aware, during our lengthy and multiple discussions with the SEIU to try and resolve subpoena issues, there was an agreement that the SEIU and documents that they would produce either from the SEIU, the Union organizers or the individuals employees could redact out the names of Presbyterian Shadyside employees. There was some concerns -- and I don't want to misstate, but raised by the Union in regard to protecting those individuals' Section 7 rights and protecting them from retaliation or coercion. The caveat to that redaction was that if we believe that the identity of those individuals was relevant to the allegations in the Complaint that we would revisit that issue with the SEIU, and if we could not reach resolution on that, that we would present it to you.

[*Id*.]

Respondent's counsel explained that she would "revisit" individual Union redactions if individuals' names were thought to be relevant to the complaint. [Tr. 129:12-16]. The parties agreed that Respondent could then seek a ruling from the ALJ to resolve any remaining dispute. [*Id*.] In all but a few instances, Respondent never objected to the redactions or otherwise asked the ALJ to rule. In one instance, Respondent even stipulated to the nature of the redacted content. *See* Tr. 288-89 (regarding RX-24). In another instance, Respondent itself offered redacted documents into evidence. *See* Tr. 328-32 (regarding rejected exhibits RX-361 and RX-362). One of the few times Respondent did object to the redactions, the ALJ sustained the objection and ordered the Union to provide unredacted versions of the documents after his in-camera review (Respondent's proposed Exhibits 210, 211, and 214). [Tr. 131:22-Tr. 13218]. On another occasion, a "less redacted" version of the exhibit (RX-207) was substituted, to which Respondent did not object. [Tr. 209].

To the extent that Respondent may have preserved a sole objection to Union redactions, that Exception must be overruled, as the ALJ's reasoning was consistent with the Act. *See* Tr. 1159-70 (objecting to redactions in GCX-73 through GCX-81).[8] Section 7 prohibits an employer

[8] The ALJ overruled Respondent's objections to redactions in these exhibits offered by the General Counsel. [Tr. 1163:10-14]. The General Counsel noted that the redactions "are not relevant to why I'm offering the exhibits." [Tr.

from seeking the disclosure of documents and communications identifying employees who supported the union or were involved in union organizing activities. *Nat'l Tel. Directory Corp., 319 NLRB* 420, 421 (1995). *See also Dilling Mech. Contrs., Inc.*, 357 NLRB No. 56, at *12-13 (2011); *Guess?, Inc.*, 339 NLRB 432, 433-34 (2003). Moreover, the Board does not compel disclosure of union-employee communications occurring in the context of the fiduciary relationship between the union and employee organizers. *See, e.g., O'Reilly Auto Parts,* No. 21-RC-21222, 2011 NLRB LEXIS 148, at slip op. *2 (Mar. 31, 2011) (hearing officer correctly revoked subpoena seeking union-employee communication because confidentiality of union-employee communication is "an important aspect of the employees' 'engage[ment] in organizing.'"); *HQM of Spencer County*, Nos. 9-CA-41323, etc., 2005 NLRB LEXIS 190, slip op. at *123-29 (April 20, 2005). *See also Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1997) (recognizing fiduciary relationship between a union and its members); *Cintas Corp*., 2010 NLRB LEXIS 106, slip op. at *11-12 (granting petition to revoke because communications made by the union to employees, along with internal documents that would disclose the union's organizing strategy, and documents that were supplied by employees to the union, are confidential).

Therefore, in the one instance where Respondent may have preserved its objection, the ALJ did not err in permitting the Union to produce responsive redacted documents.

Finally, if the ALJ committed any error with regard to the redactions in GCX 73-81, it was harmless, as Respondent failed to demonstrate how these redactions were material to the outcome of this case.[9] See *800 River Road Operating Co., LLC d/b/a Woodcrest Health Care*

1159:8-12]. Union counsel explained that the redactions showed that union organizers forwarded the documents to counsel. [Tr. 1163: 3-9]. The ALJ overruled the objection on the ground that the redactions concerning the names of the persons to whom the emails had been forwarded were not substantive and that "the substantive parts of the document I think are set forth…" [Tr. 1163:10-14].

[9] Respondent makes no argument that there was any harm caused by the redactions in GCX 73 through GCX-81. Respondent does argue elsewhere that the ALJ's decision allowing redactions in ***other*** exhibits, Respondent's

Ctr. & 1199 SEIU United Healthcare Workers E., 359 NLRB No. 48 (2013)(applying harmless error to hearing officer's revocation of subpoena).

III. The ALJ properly denied, in part, Respondents' Petitions to Revoke Subpoenas B-720565, B-720563 and B-720504, relating to the single employer allegations in the complaint and the issue is now pending in enforcement proceedings in the Third Circuit Court of Appeals (Respondent's Exception 41).

Prior the commencement of the hearing, the General Counsel and the Union issued three separate subpoenas *duces tecum* to Respondents UPMC Presbyterian Shadyside and UPMC concerning the single employer issue. Respondents filed petitions to revoke, and the ALJ initially deferred ruling until after the resolution of substantive unfair labor practice allegations. [ALJD 2:13-24].[10] On February 24, 2014, the ALJ partially denied the petitions to revoke. [Tr. 913:11 – 914:18].[11]

With regard to the General Counsel's subpoenas to Presbyterian Shadyside, B-720565, and UPMC, B-720563, the ALJ granted the petitions to revoke Paragraph 35 in each subpoena, which he found to be overly broad. [Tr. 913:3-15]. The ALJ also revoked substantial parts of the Union's subpoena to Respondent UPMC, B-720504, including Paragraphs 1-4, 10-11, 17, 19, 20, 21, 26-27, 28, 39, 49-53, 57, 60-65, 67-69, finding these sections to be overly broad. [Tr. 913: 22 -914:12].[12]

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rejected Exhibits 361 and 362, was erroneous because such evidence was "relevant to the hospital's defenses and would have undermined the credibility of the General Counsel's and Union's witnesses." [Resp. Brf. at 23]. But these exhibits were not admitted . Since the exhibits were rejected, the issue of any redactions would be moot unless the Board overrules the ALJ's admissibility decision..

[10] "ALJD" refers to the Decision of Administrative Law Judge Mark Carissimi issued on November 14, 2014.

[11] Subpoena B-720565 is Resp. Exh. 502; Subpoena B-720563 is Resp. Exh. 501; and Subpoena B-720504 is Charging party Exh. 2.

[12] Respondent Presbyterian Shadyside does not take exception to the ALJ's order concerning the Union's subpoena to UPMC. [See Exception 41, Resp. Brf. at 27-30].

Thereafter, Respondents did not file a request for special permission to appeal the ALJ's decision to the Board pursuant to Section 102.26 of the Board's Rules and Regulations and instead, contumaciously refused to comply with the ALJ's order.[13] On March 20, 2014, pursuant to Section 11(2) of the Act, 29 U.S.C. §161(2), the General Counsel filed an application on behalf of the Board to enforce the Union's and General Counsel's three subpoenas in the U.S. District Court for the Western District of Pennsylvania in the consolidated case, *NLRB v. UPMC Presbyterian Shadyside*, Case no. 2:14-mc-00109-AJS *et seq* (W.D. Pa.).[14] The General Counsel did not seek to enforce the portions of the subpoenas that had been revoked by the ALJ.

On April 3, 2014, the ALJ severed the single employer allegations from the unfair labor practice allegations. [ALJD 2:33-37]. The ALJ reasoned that "in light of the ongoing subpoena enforcement proceedings in the district court, there was substantial uncertainty as to when the single employer allegations would proceed to trial." [*Id*. at 2: 37 – 3:3]. As a result, the single employer allegations have not yet been heard by the ALJ.

Respondent opposed the enforcement of the subpoenas in district court, arguing, *inter alia*, burdensomeness and relevance. On August 22, 2014, the district court granted the Board's application to enforce all three subpoenas, amending its order on September 2, 2014, and staying its orders pending appeal. Respondent's Motion for Reconsideration was denied on October 27,

[13] Pursuant to NLRB Rules and Regulations §102.31(d), the General Counsel was required to "institute proceedings in the appropriate district court for the enforcement thereof…"Section 102.31(d) of the Board's Rules and Regulations, provides that "Upon the failure of any person to comply with a subpoena issued upon the request of a private party, the General Counsel ***shall*** in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for the enforcement thereof, unless in the judgment of the Board the enforcement of such subpoena would be inconsistent with law and with the policies of the Act." (Emphasis added).

[14] Section 11(2) provides in pertinent part that "In case of contumacy or refusal to obey a subpoena, any district court of the United States…within the jurisdiction of which the inquiry is carried on….upon application of the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board …there to produce evidence if so ordered…"

2014. Respondent's appeal to the Third Circuit is pending, *NLRB v. UPMC Presbyterian Shadyside*, No. 14-4523 (3rd Cir.).[15]

Given that the statutory and regulatory enforcement scheme has already been invoked by virtue of Respondent's refusal to obey the ALJ's decision, the pending decision by the Third Circuit will have effectively preempted the Board's review of this matter. Indeed, it is unclear whether the Board would have any statutory authority to disobey, overturn or modify the scope of any enforcement decision by the Court of Appeals. An administrative agency is require to implement the "letter and spirit" of an appellate decision. *See e.g., Georgia Pac. Consumer Products, LP v. Von Drehle Corp*., 710 F.3d 527, 536 (4th Cir. 2013); *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 675 F.3d 433, 438 (5th Cir. 2012); *Scott v. Mason Coal Co*., 289 F.3d 263, 267-68 (4th Cir. 2002); *Cleveland v. Federal Power Commission*, 561 F.2d 344, 346 (D.C. Cir. 1977) (agency must follow law of the case).[16]

Respondent argues that compliance with the single employer subpoenas would be too burdensome, and that the documents sought are not "material to any matter in dispute." [Resp. Brf. at 28-29]. These are the same arguments already rejected by the district court. While Respondent acknowledges the pendency of the Third Circuit appeal, it vaguely contends that the "scope of review in the Third Circuit may be more limited than the breadth of the ALJ's error…" – but does not articulate the nature of the "breadth of the ALJ's error." [Resp. Brf. at 28, n.9] Moreover, Respondent does not suggest any authority by which the Board could reverse or

[15] On December 22, 2014, the General Counsel filed a Motion for Summary Affirmance seeking the case to be decided on an expedited basis. The matter has been briefed and a decision is pending.

[16] In any event, the final decision by the Court of Appeals will represent the law of the case on this issue. *Christianson v. Colt Indus. Operating Corp*., 486 U.S. 800, 816 (1988) (decision on an issue made by a court at one stage of a case must be given effect in successive stages of the same litigation). The Board regularly applies the doctrine of law of the case in analogous circumstances between the same parties for the purposes of not reopening adjudicated questions of law. *See, e.g., Dynatron/Bondo Corp.*, 330 NLRB 16, 1 (1999); *Technology Service Solutions*, 332 NLRB 1096, 1096 fn. 3 (2000); *Transp. Serv. Co.*, 314 NLRB 458, 459 (1994).

modify the ALJ's decision without simultaneously interfering with the Court of Appeals' review. Accordingly, this Exception must be denied.

IV. The ALJ correctly awarded the remedies of reinstatement, notice reading and a broad order, in light of the fact that Respondent committed numerous continuing and egregious violations of the Act. (Respondent's Exceptions 293-298).[17]

A. The ALJ's Proposed Remedies Are Supported by a Preponderance of the Evidence. (Exceptions 293, 298).

Respondent contends that the ALJ erred in "proposing extreme remedies" because they are "unsupported by a preponderance of the evidence of record." [Exceptions 293, 295, 298; Resp. Brf. 167]. Respondent's contentions are belied by the ALJ's detailed factual findings and conclusions of law. The ALJ concluded that Respondent:

(a) unlawfully disciplined and discharged four employees in violation of §8(a)(3) (Ron Oakes, Al Turner, James Staus and Finley Littlejohn);

(b) unlawfully disciplined three other employees in violation of §8(a)(3) (Leslie Poston, Chaney Lewis and Felicia Penn);

(c) unlawfully disciplined or discharged two employees because they cooperated in the Board's investigation in violation of §8(a)(4) (Chaney Lewis and Ron Oakes);

(d) unlawfully formed and dominated an ESS Employee Council in violation of §8(a)(2); and

(e) committed about 42 other violations of §8(a)(1), including threatening to arrest Union organizers meeting with workers in the hospital cafeteria, engaging in unlawful surveillance, intimidating employees, engaging in coercive interrogations about employees' union activities, unlawfully threatening discipline, unlawfully threatening an employee with a poor evaluation if she continued to support the Union, unlawfully demanding to photograph employees wearing Union insignia, unlawfully disparaging an employee engaged in Union support, discriminatorily prohibiting the wearing of Union insignia, and engaging in discriminatory enforcement of its solicitation, distribution and bulletin board access rules.

[17] The Union has argued in its January 9, 2015 Limited Exceptions to the ALJ's Decision that, although the remedies imposed by the ALJ are all appropriate, including notice reading and broad order, they are insufficient to remedy the breadth of the violations which were found to have occurred, and that additional remedies should have been awarded as well. Accordingly, the Union incorporates by reference the arguments made in support of its Limited Exceptions 6-10.

ALJD at 112-114.

The ALJ's conclusions are supported by an extremely detailed analysis of the record, including witness credibility determinations. Respondent offers eight pages of record citations in support of its Exceptions 293 and 298, but as shown below, the citations have no relationship to the issue of appropriate remedies, and in some instances, actually ***support*** the correctness of the ALJ's conclusions. Accordingly, Respondent's Exceptions must fail in the absence of any evidentiary support. *See,* Board Rules and Regulations §102.46(b).

For example, Tr. 1134:14-1135:6 refers to the testimony of Keith Lewis, a former UPMC supervisor who reported to manager Bart Wyss that supervisor Ted Hill had been using his cell phone while driving. The cited testimony supports the §8(a)(3) violations involving employee Al Turner, and shows that Respondent imposed disparate discipline on Turner for the same offense. The ALJ credited Lewis' testimony in support of his conclusion that Respondent violated §8(a)(3) in discharging Turner. [ALJD at 98-99].[18]

Similarly, Respondent's other record citations do not support the point that a "preponderance of evidence" was lacking. For example, Tr. 480:7- 481:14, Tr. 482-6-12, Tr. 482-17-21, and Tr. 483:4-15 include the testimony of Felicia Penn concerning the incident that led to her final written warning. The ALJ however, found that this portion of Penn's testimony was inconsistent with that of another witness called by Respondent, Aleasha Curtaccio, and he credited Curtaccio's testimony as "more reliable." [ALJD at 45]. Despite crediting Curtaccio, the ALJ went on to find that "Respondent has not demonstrated that it would have taken the same action toward Penn in the absence of her protected union activity." [ALJD at 50-51].

[18] The ALJ found that Lewis' testimony "was detailed and his demeanor reflected that he distinctly recalled the events that he testified about…On the other hand, Wyss testified regarding the issues in a somewhat perfunctory manner and without much detail. On balance, I find the testimony of Lewis is the more reliable version." ALJD at 99.

Likewise, Respondent's other three transcript citations have no discernible connection to its "preponderance of evidence" argument. [Tr. 711, Tr. 978, and Tr. 1107].[19] Consequently, the transcript citations offered by Respondent do not support its "preponderance of evidence" Exceptions which must therefore be denied.

B. Notice Reading and a Broad Order Are Appropriate Here. (Exceptions 295-298).

Respondent contends that the remedies of notice reading and a broad order are improper because the General Counsel failed to establish that it "engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." [Resp. Brf. at 168]. Without citing to any evidence, Respondent further self-servingly declares that it "does not have a proclivity to violate the Act," referring to unspecified "decades of productive bargaining relationships with this and other unions without a high incidence of unfair labor practice charges." [*Id*.] These points are merely gratuitous comments without evidentiary support in the record.

Contrary to Respondent's argument, the ALJ found that the employer's unfair labor practices were serious and far-reaching, concluding that,

> The Respondent responded to the Union's organizing campaign with extensive and serious unfair labor practices. In the first instance, the Respondent has engaged in numerous violations of Section 8(a)(1) of the Act. As part of its campaign in opposing the Union, and in order to dissuade employees from supporting it, the Respondent formed and dominated the ESS employee council in violation of Section 8(a)(2) and (1) of the Act. In addition, the Respondent discharged four employee supporters of the Union, including three of the most visible, Oakes, Turner, and Staus. The Board has noted that the unlawful discharges of union supporters are highly coercive and that is particularly true when employee leaders of the union movement have been terminated. While the

[19] Tr. 711:24-712:1 (testimony of Shawn Matulevec, discussing filling "holes" in supply cabinets; Tr. 978:8-12 (testimony of Al Turner that he received discipline due to union support); and Tr. 1107:9-15 (testimony of J. Brown about adequate space in supply cabinets exceeding PAR requirements). None of these references support the Exceptions.

> potential unit of nonclinical support employees that the Union is attempting to organize is large, approximately 3500 employees, the Board has granted a notice reading remedy when serious unfair labor practices have been committed in a relatively large unit.

ALJD at 115.

Respondent argues that its ULPs were not "pervasive," "numerous," or "outrageous" in the context of its large workforce – and that "only" eight employees had 8(a)(3) claims. [Resp. Brf. at 168-169].[20] But the ALJ properly recognized that Respondent's four discharges, including the discharges of three of the Union's most prominent supporters, were "highly coercive and that is particularly true when employee leaders of the union movement have been terminated," citing *Excel Case Ready*, 334 NLRB 4, 5 (2001). [ALJD at 115]. The ALJ further correctly relied on *Audubon Regional Medical Center*, 331 NLRB 374 (2000) in reasoning that such serious unfair labor practices, even when committed in a large unit, but "committed in several different departments," warrant a notice reading remedy. [ALJD at 115]. [21]

The ALJ specifically "rel[ied] particularly on the history of employer hostility to the union activities of its nonclinical support staff employees." ALJD at 95. *See also, id* at 41 ("Respondent has demonstrated hostility to the Union's attempt to organize its employees"); *id*. at 64 ("I find that there is a history of employer hostility to the union and protected activity"); *id*. at 73 ("Respondent harbored animus toward the union activities of its non-clinical support staff…"). Significantly, the ALJ found that Respondent committed two violations of Section 8(a)(4) in discharging Ron Oakes and disciplining Chaney Lewis. [ALJD at 73-79; 90-91]. Those 8(a)(4) violations dramatically magnified the impact of all the other unlawful conduct by

[20] Respondent also incorrectly implied that the Union is seeking to organize its entire workforce of 9,000 employees. [Resp. Brf. at 168-169]. In fact, the Union is attempting to organize respondent's nonclinical employees, a unit of about 3500 employees. ALJD at 115.

[21] Respondent further contends that the notice reading remedy "is contrary to the substantial evidence in the record as a whole." Exceptions 295, 296. However, the record citation proffered by Respondent – Tr. 1-1416, the entire case put on by the General Counsel – is not only improper but does nothing to shed any light on the Exception.

subverting the employees' only available avenue for seeking justice for their unlawful treatment at the NLRB.

Accordingly, the notice reading remedy was proper and consistent with the Board's recent authorities. See, *Latino Express, Inc. & Carol Garcia & Pedro Salgado & Int'l Bhd. of Teamsters, Local 777*, 361 NLRB No. 137 (Dec. 15, 2014) (reading of notice by owner or in his presence, is appropriate "to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices," and will allow the employees to "fully perceive that the Respondent and its managers are bound by the requirements of the Act."); *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008) (notice-reading remedy ordered where respondent's senior manager threatened plant closure and job loss at meetings if employees voted for union representation).

In addition to notice reading, the ALJ entered a "broad order." ALJD at 116. He concluded that "Respondent has engaged in such egregious and widespread misconduct so as to demonstrate a general disregard for employees' statutory rights and I will therefore issue a broad order requiring Respondent to refrain from engaging in conduct violative of the Act 'in any like or related manner.'" ALJD at 116. The ALJ's order in this respect was thus consistent with the remedies affirmed by the Board in its recent decision, *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 2 (2014).[22]

Accordingly, the Board should deny Respondent's Exceptions concerning appropriate remedies. The ALJ properly proposed the special remedies of notice reading and the broad order,

[22] Respondent contends that the broad order was "contrary to the substantial evidence in the record as a whole." [Exceptions 297, 298]. Again, inexplicably, Respondent cites the same immaterial transcript references described above in Argument Section IV (A), which actually ***support*** the validity of the ALJ's conclusions. *See, e.g.*, Tr. 1134:14-1135:6 , Tr. 480:7- 481:14, Tr. 482-6-12, Tr. 482-17-21, Tr. 483:4-15, Tr. 711, Tr. 978, and Tr. 1107. Plainly, these transcript citations do not support Respondent's Exceptions or its contention about the "substantial evidence in the record."

which are necessary to address both the large number and the broad scope of Respondent's ULPs. [23]

C. The reinstatement of Turner and Staus is an appropriate remedy, and there is no applicable "public policy" exception under the circumstances here (Exception 294).

Respondent asserts that the proposed remedy of reinstatement for discriminatees Al Turner and James Staus violates a non-existent "public policy exception" because they were allegedly fired for violating health and safety rules. [Exception 294; Resp. Brf. 167, 169-170; Exception 294]. Respondent's argument fails for a number of reasons.

First, Respondent's premise is factually incorrect, as neither Staus nor Turner was terminated for violating any federal law or state licensing provision. Turner was fired for violating the tardiness policy.[24] Staus was terminated for failing a Performance Improvement Plan (PIP).[25] In both cases, the ALJ found that Respondent failed to meet its *Wright Line* burden and that it had engaged in discriminatory enforcement of its disciplinary policies. [ALJD at 99-100 (Turner); *id*. at 111-112 (Staus)]. But even assuming *arguendo* that Staus and Turner had actually been fired for allegedly violating federal laws or state licensing provisions, the ALJ

[23] The Board has "broad discretion to fashion 'a just remedy' to fit the circumstances of each case it decides." *HTH Corp.*, 356 NLRB No. 182, slip op. at 9 (2011) (citing *Excel Case Ready*, 334 NLRB 4, 5 (2001)); *WestPac Electric, Inc.*, 321 NLRB 1322, 1322 (1996). Extraordinary remedies are proper where it has found "the Respondent's unfair labor practices are 'so numerous, pervasive, and outrageous' that they are necessary 'to dissipate fully the coercive effects of the unfair labor practices found.'" *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003), quoting *Fieldcrest Cannon, Inc*., 318 NLRB 470, 473 (1995). This is precisely what the ALJ found here.

[24] The ALJ found that Turner was, at an earlier time, unlawfully given a final written warning for using his cell phone while driving a shuttle bus because Respondent engaged in disparate enforcement of its cell phone usage policy. ALJD at 99-100. That discipline subsequently accelerated Turner's seven tardiness occurrences to nine, the number required to warrant discharge under Respondent's progressive discipline policy. ALJD at 100. "By relying on the discriminatorily motivated final warning to accelerate Turner to the discharge level under its progressive discipline policy, the Respondent's discharge of Turner also violates Section 8(a)(3) and (1) of the Act." *Id*.

[25] Respondent contends that Staus "failed to comply with Department of Health and Joint Commission of Health standards in maintaining his supply closets" although that was not the basis for the discharge. [Resp. Brf. at 170]. The supporting exhibit Respondent cites, GC 187, is merely Staus' Performance Improvement Plan not the termination document.

found that the asserted reasons for the discharges were pretextual. Respondent therefore cannot rely on these false reasons as the basis for its "public policy" exception argument.

Second, Respondent's argument fails because it is speculative. It contends that Staus and Turner should not be reinstated because their future conduct upon reinstatement has "the ***potential*** to jeopardize patient safety and care" (in the case of Staus) and there is a "***likelihood*** that Turner would continue to violate [Department of Transportation safety] regulations upon reinstatement." [Resp. Brf. at 170 (emphasis added)]. This hypothetical argument makes no sense and is contrary to the remedial policies of the Act.

Finally, there is no "public policy exception" applicable to the remedy of reinstatement under the circumstances here. Reinstatement pursuant to Section 10(c) of the Act is ***the*** statutory remedy for violations of Section 8(a)(3).[26] See, *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941)("[T]he effectuation of this important policy [industrial peace] generally requires not only compensation for the loss of wages but also offers of employment to the victims of discrimination. Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.").

Respondent's reliance on *N.L.R.B. v. U.S. Truck Co*., 124 F.2d 887, 890 (6th Cir. 1942) is misplaced. There, reinstatement of two fired employees would have violated federal and local statutes mandating companies not to employ drivers found to be intoxicated while driving. The Sixth Circuit vacated the Board's reinstatement order where it "indisputably required the employer to violate other statutes highly important to the public safety." By contrast, the terminations here did not result from any safety rule violations, and Respondent would be

[26] Section 10(c) of the Act establishes the power of the Board to remedy unfair labor practices through "an order requiring such person …to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

violating no safety laws by reinstating Staus or Turner. Indeed, the Board later distinguished *U.S. Truck* under circumstances similar to those here in *Operating Engineers Local 57 (M. A. Gammino Constr. Co.)*, 108 NLRB 1225 (1954).[27]

The Board should deny Respondent's Exception 294 for the reasons stated above.

CONCLUSION

Based on the foregoing arguments and authorities, and the arguments and authorities presented by the General Counsel in his Answering Brief, the Board should deny Respondent Presbyterian Shadyside's Exceptions.

Dated: February 20, 2015

Respectfully submitted,

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[27] In *Operating Engineers*, the employer terminated an employee for the pretextual reason that he lacked a Rhode Island license. Subsequently, the employee obtained his Rhode Island license. The Board found that "[U]nlike *U. S. Truck*, in this case the order does not require anyone to violate any law as our order does not require reinstatement of a man who lacks a license; there is, therefore, neither any conflict in policies as the court found in *U. S. Truck*, nor any order to perform an illegal act which the court found repugnant in that case." *Id.* at 1227.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Charging Party's Answering Brief in Opposition to Presbyterian Shadyside's Exceptions in the above captioned case has been served by email on the following persons on this 20th day of February 2015:

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